

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY**

Excelerate Liquefaction Solutions I, LLC

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FE Docket No. 12-146-LNG

**ANSWER OF EXCELERATE LIQUEFACTION SOLUTIONS I, LLC
TO MOTION TO REPLY AND REPLY OF SIERRA CLUB**

ELS Liquefaction Solutions I, LLC (“ELS I”) submits this Answer pursuant to Sections 590.302(b) and 590.304(f) of the Department of Energy’s (“DOE”) regulations¹ to the motion to reply and reply submitted by Sierra Club in this proceeding on March 21, 2013.² The Motion should be denied. Sierra Club disregards the rules of practice and procedure of the DOE only to repeat many of the same arguments that it made in its original protest.³ The Motion is effectively a supplemental protest that requests that the DOE’s Office of Fossil Energy (“DOE/FE”) act contrary to applicable law and established precedent.

To the extent that DOE/FE grants the Motion, ELS I requests that it also accept this Answer.⁴ In support of this Answer, ELS I states the following:

¹ 10 C.F.R. §§ 590.302(b) and 590.304(f) (2013).

² Sierra Club’s Renewed Motion to Reply and Reply, *ELS Liquefaction Solutions I, LLC*, FE Docket 12-146-LNG (filed Mar. 21, 2013) (“Motion”).

³ See Motion to Intervene, Protest, and Comments of Sierra Club, *ELS Liquefaction Solutions I, LLC*, FE Docket 12-146-LNG (filed Feb. 4, 2013) (“Protest”).

⁴ Pursuant to Section 590.302(b) of DOE’s regulations, this Answer is timely filed. See 10 C.F.R. § 590.302(b) (“Any party may file an answer to any written motion within fifteen (15) days after the motion is filed.”).

I. ANSWER TO MOTION

On March 7, ELS I filed its answer to Sierra Club's Protest in this proceeding. Regardless of how Sierra Club labels its Motion, the DOE regulations do not give Sierra Club the right to respond to the answer filed by ELS I on March 7. Sierra Club argues that it reserved permission in its Protest to file a reply "if an answer was filed" and that "Excelerate did not oppose that request[.]"⁵ The reservation of a procedural right to reply is a nullity; either Sierra Club has the right or it does not. The DOE regulations do not allow for an answer to an answer.

II. ANSWER TO REPLY

To the extent that DOE/FE grants the Motion, ELS I submits this response to Sierra Club's comments pursuant to Sections 590.302(b) and 590.304(f) of the DOE's regulations.⁶

A. Sierra Club Misstates Applicable Authority with Respect to DOE/FE's Rebuttable Presumption in Favor of Natural Gas Exports.

The rebuttable presumption in favor of exports is based on Section 3(a) of the Natural Gas Act ("NGA"),⁷ not the DOE's *Policy Guidelines*⁸ as Sierra Club mistakenly argues.⁹ Although the *Policy Guidelines*, as refined through agency and court decisions, continue to play an important role in the public interest review process used by the DOE/FE for natural gas exports,¹⁰ Section 3(a) of the NGA establishes the rebuttable presumption in favor of natural gas

⁵ Motion at 1.

⁶ 10 C.F.R. §§ 590.302(b) and 590.304(f).

⁷ 15 U.S.C. § 717b.

⁸ *New Policy Guidelines and Delegation Orders From Secretary of Energy to Economic Regulatory Administration and Federal Energy Regulatory Commission Relating to the Regulation of Imported Natural Gas*, 49 Fed. Reg. 6684 (Feb. 22, 1984) ("*Policy Guidelines*").

⁹ Motion at 3.

¹⁰ *Sabine Pass Liquefaction, LLC*, FE Docket No. 10-111-LNG, DOE/FE Order No. 2961 (May 20, 2011) ("Sabine Pass Non-FTA Order"); *ConocoPhillips Alaska Natural Gas Corp.*, FE Docket No. 07-02-LNG, DOE/FE Order No. 2500 (Jun. 3, 2008); *Phillips Alaska Natural Gas Corp.*, DOE/FE Order No. 1473, 2 FE ¶ 70,317 (1999) ("Order No. 1473").

exports.¹¹ The NGA requires the DOE/FE to issue an order authorizing the export of LNG unless “it finds that the proposed exportation or importation will not be consistent with the public interest.”¹² DOE/FE cannot avoid this statutory obligation or abandon its established precedent simply because Sierra Club urges that “DOE/FE need not follow the guidelines or the rebuttable presumption approach.”¹³

B. A Programmatic EIS is not Appropriate in this Proceeding.

Citing *Foundation on Economic Trends v. Heckler*, 756 F.2d 143 (D.C. Cir. 1985), Sierra Club states that a programmatic environmental impact statement (“EIS”) should be prepared when actions are “sufficiently ‘similar’” and that a programmatic EIS is the “best way” to identify environmental effects.¹⁴ This proposition in *Heckler* is taken from the Council on Environmental Quality’s (“CEQ’s”) regulations, which provide that in determining the scope of an EIS, an agency must consider:

Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences [sic] together such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.¹⁵

Sierra Club does not even attempt to explain its determination that the pending non-FTA export applications are sufficiently similar such that there is a basis for evaluating their environmental consequences together, ignoring the different timelines, geographic locations,

¹¹ *Panhandle Producers & Royalty Owners Ass’n v. ERA*, 822 F.3d 1105, 1111 (D.C. Cir. 1987) (“A presumption favoring import authorization, then, is completely consistent with, if not mandated by, the statutory directive.”); see also Sabine Pass Non-FTA Order at 28 (May 20, 2011) (citing to Order No. 1473 at 13).

¹² 15 U.S.C. § 717b.

¹³ Motion at 4.

¹⁴ Motion at 4 (quoting *Heckler*, 756 F.2d at 159).

¹⁵ 40 C.F.R. § 1508.25(a)(3) (2012).

technologies, environmental impacts and potential sources of natural gas supply of the projects underlying the proposed authorizations as well as the fact that not all export applicants are even attached to a particular project. Nor does Sierra Club attempt to explain how a programmatic EIS is the “best way” to adequately assess the specific environmental impacts of, and proposed alternatives to, each proposed export. Although Sierra Club may desire a programmatic EIS, it has fallen far short of showing that a programmatic EIS is an appropriate way, let alone the *best way*, to assess the environmental consequences of a range of non-FTA export applications.

C. DOE/FE May Issue a Conditional Order.

The DOE/FE may issue an order conditioned on the satisfactory completion of a project-specific EIS at FERC. Sierra Club’s arguments to the contrary rely on an erroneous interpretation of the applicable regulations based on an incomplete reading and a misguided presumption that DOE/FE will undertake a programmatic EIS. Moreover, accepting Sierra Club’s approach would result in unnecessary administrative burdens on DOE/FE.

First, Section 590.402 of the DOE’s regulations expressly allow the issuance of “a conditional order at any time during a proceeding prior to issuance of a final opinion and order.”¹⁶ None of the regulations cited by Sierra Club contradict the authority granted DOE/FE by Section 590.402.

Second, in asking the DOE/FE to apply Section 1021.211 of its regulations and not issue a conditional order, Sierra Club asks the DOE/FE to ignore the plain language of its regulations. Section 1021.211 limits the types of action allowed by the DOE “[w]hile DOE is

¹⁶ 10 C.F.R. § 590.402. The DOE/FE followed this precise procedure in the Sabine Pass proceeding, issuing a conditional order on May 20, 2011 and issuing a subsequent final opinion and order on August 7, 2012, after reaching a finding that granting the application will not have a significant effect on the human environment. Sabine Pass Non-FTA Order; *Sabine Pass Liquefaction, LLC*, FE Docket No. 10-111-LNG, DOE/FE Order No. 2961-A (Aug. 7, 2012) (“Order No. 2961-A”).

preparing an EIS that is required under § 1021.300(a)[.]”¹⁷ The FERC, not the DOE/FE, is preparing the EIS.¹⁸ Accordingly, because DOE/FE will not prepare the EIS, Section 1021.300(a) does not apply.

Even if Section 1021.211 of DOE’s regulations applies here, a conditional order is consistent with the regulations of the DOE and the CEQ as it concerns an interim action. Section 1021.211 provides that “DOE shall take no action concerning the proposal that is the subject of the EIS before issuing a ROD, *except as provided at 40 C.F.R. § 1506.1.*”¹⁹ Sierra Club’s reliance on 40 C.F.R. § 1506.1(c), which applies to interim actions taken while a programmatic EIS is being prepared, presumes that DOE/FE will prepare a programmatic EIS. As discussed above, there is no basis for undertaking a programmatic EIS. Nor has Sierra Club provided a compelling argument that an interim order would not meet the requirements of 40 C.F.R. § 1506.1(c)(1)-(3).

Even applying 40 C.F.R. § 1506.1(a) leads to the conclusion that an interim order is permissible. Section 1506.1(a) of the CEQ’s regulations prohibits actions that would “have an adverse environmental impact” or “limit the choice of reasonable alternatives” until a record of decision is issued.²⁰ Issuance of a conditional order by DOE/FE will not have an adverse environmental impact. Sierra Club does not argue that it would. Instead, Sierra Club asserts that the conditional order limited FERC’s alternatives analysis in the Sabine Pass proceeding. Sierra Club provides no credible support for its arguments that FERC “considered an unreasonably narrow range of alternatives” or that “FERC’s decision appears to have rested in part on

¹⁷ 10 C.F.R. § 1021.211 (emphasis added).

¹⁸ *Excelerate Liquefaction Solutions I, LLC and Lavaca Bay Pipeline System, LLC*, Notice of Intent to Prepare an EIS, Docket No. PF13-1-000 (Mar. 5, 2013).

¹⁹ 10 C.F.R. § 1021.211 (emphasis added).

²⁰ 40 C.F.R. § 1506.1(a).

DOE/FE's conditional authorization."²¹ Rather, Sierra Club speculates "that FERC felt that it was not free to give the no-action alternative serious consideration" because "conditional approvals in fact tend to limit alternatives and influence decisionmaking."²² As explained in ELS I's Answer, these arguments are baseless and refuted by FERC's alternatives analysis in *Sabine Pass*.²³

Finally, the issuance of conditional orders is a long-standing DOE/FE practice that facilitates administrative efficiency, while ensuring that the necessary environmental review is undertaken by the lead agency (FERC in this instance). Sierra Club's request would cause unnecessary delays in the administrative process without providing any additional review from an environmental perspective.

D. DOE/FE Need Not Consider Gas Production within the Scope of Authorization Approval.

The impacts of future natural gas production activities that the ELS I project could potentially induce are not reasonably foreseeable and neither DOE/FE nor the FERC is required to consider such impacts. Despite its disparate and unsupported responses to ELS I's Answer,²⁴ Sierra Club's Motion fails – as its Protest failed – to demonstrate that the impacts of induced production are either "reasonably foreseeable" or that any of the generalized data points and unduly speculative assumptions it proffers could permit either the DOE/FE or the FERC to conduct any sort of meaningful environmental analysis of those supposed effects. As the DOE/FE has observed, "the existence of [environmental] concerns does not establish a causal connection capable of supporting meaningful analysis of the potential environmental impacts of

²¹ Motion at 6; Protest at 19.

²² Protest at 19.

²³ See Answer to Motion to Intervene, Protest, and Comments, *ELS Liquefaction Solutions I, LLC*, FE Docket 12-146-LNG, at 26-27 (filed Mar. 7, 2013).

²⁴ Motion at 7-8.

whether or how the Liquefaction Project and the exports of natural gas from the Project will affect shale gas development.”²⁵ Because a demonstration of reasonable foreseeability is indispensable for an agency’s environmental analysis of indirect impacts under the NEPA,²⁶ Sierra Club’s arguments urging the DOE/FE to analyze the indirect impacts of induced production must be rejected.

Sierra Club is wrong in asserting that “[s]tate regulation of production is irrelevant”²⁷ to the NEPA analysis. As both the FERC and DOE/FE have concluded, the lack of federal jurisdiction over gas production activities speaks to whether the impacts of such activities are reasonably foreseeable.²⁸ The nature and extent of the impacts of natural gas production are inextricably linked to the numerous and wide-ranging policies and procedures implemented by state and local agencies exercising jurisdiction over upstream activities, including environmental mitigation requirements. As a result, it cannot be determined with any degree of certainty where any potential increased production will occur, making environmental impacts from production unknowable. This uncertainty contributes significantly to the conclusion that the impacts from upstream production are not reasonably foreseeable.

The cases cited by Sierra Club in support of its position regarding the relevance of state and local jurisdiction over production do not support Sierra Club’s arguments and in fact serve to illustrate why the purported impacts of induced production are not “reasonably foreseeable.” For example, *Taxpayers of Michigan Against Casinos v. Norton* involved a federal agency’s analysis of indirect impacts from motor vehicle traffic, not subject to the agency’s

²⁵ Order No. 2961-A at 28.

²⁶ See 40 C.F.R. § 1508.8(b).

²⁷ Motion at 6.

²⁸ *Sabine Pass Liquefaction, LLC*, 139 FERC ¶ 61,039, at P 98, *reh’g denied*, 140 FERC ¶ 61,076 (2012); Order No. 2961-A at 28.

jurisdiction, but which could be identified for “specific geographic areas potentially impacted by [a proposed] gaming resort,” in which the federal agency could predict “the pattern and extent of casino-induced residential and commercial growth by analyzing, among other things, zoning laws, permitting requirements, economic forecasts, demographics, available utilities, environmental regulations, and land use practices.”²⁹ This is exactly the type of information that is lacking in the context of natural gas production, where environmental impacts are heavily influenced by location and applicable regulatory standards.

Sierra Club relies upon *Scientists’ Institute for Public Information v. Atomic Energy Commission*³⁰ for the proposition that specific information regarding the location of indirect impacts is not necessary for a federal agency to analyze the indirect impacts of a project.³¹ *Scientists* is distinguishable from the current circumstances. In *Scientists*, an EIS was required for continued research and development on the Atomic Energy Commission’s new Liquefied Metal Fast Breeder Reactor (“LMFBR”) Program covering foreseeable environmental effects if such a reactor were put into future use. The court determined that the agency already possessed detailed information regarding the indirect effects of its LMFBR program, including “much information on alternatives to the program and their environmental effects.”³² In contrast, as the FERC recognized in the *Sabine Pass* proceeding, there is currently “no detailed or quantifiable information with respect to induced shale production that would assist [a federal agency] in a meaningful analysis.”³³

²⁹ *Taxpayers of Michigan Against Casinos v. Norton* 433 F.3d 852, 858 (D.C. Cir. 2006).

³⁰ 481 F.2d 1079 (1973).

³¹ Motion at 7.

³² 481 F.2d at 1097.

³³ 140 FERC ¶ 61,076, at P 22. Sierra Club argues that induced production from the ELS I project is reasonably foreseeable inasmuch as the EIA projects that 63% of LNG exports will derive from new production. Motion at 7. However, the EIA figure is a general projection of market-wide data and does not relate specifically to the ELS I

Finally, none of the precedent cited in Sierra Club’s pleadings support its position regarding the indirect impacts of induced production. Having failed to rehabilitate the case law cited in its Protest and distinguished by ELS I, Sierra Club argues that *Habitat Education Center v. U.S. Forest Service*³⁴ stands for the proposition that “when the nature of the effect is reasonably foreseeable but its extent is not . . . the agency may not simply ignore the effect.”³⁵ In this instance, neither the nature nor the effect of potential impact is known with any degree of certainty. It is not simply the magnitude of the impacts of production that is uncertain but also the type and quality of those impacts. Accordingly, the federal agency cannot engage in any “meaningful discussion” of the impacts, which are not reasonably foreseeable.³⁶

E. SIERRA CLUB’S ARGUMENTS REGARDING ECONOMIC BENEFIT DO NOT REBUT THE PRESUMPTION THAT THE PROJECT IS IN THE PUBLIC INTEREST

Sierra Club offers no new arguments in its Motion to rebut evidence provided in ELS I’s Application that the ELS I project is in the public interest. Sierra Club’s claims regarding the economic benefits of the ELS I project have failed to rebut the presumption that the project is in the public interest.

project. Further, neither the EIA study nor any of the other broad data points to which Sierra Club has cited provide any insight on the nature or extent of any supposed impacts from induced production. Such generalized discussion would be unduly speculative and not useful to a meaningful environmental analysis.

³⁴ 609 F.3d 897 (7th Cir. 2010)

³⁵ 609 F.3d at 902.

³⁶ *Id.*

III. CONCLUSION

Sierra Club's Motion is an attempt to submit untimely, supplemental comments, contrary to DOE's regulations. For this and the foregoing reasons, Sierra Club's Motion should be denied. To the extent that DOE/FE grants the Motion and accepts Sierra Club's supplemental comments, ELS I submits this Answer for the DOE's consideration.

Respectfully submitted,

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Date: April 5, 2013

cc: Service List

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing to be served upon each person designated on the official service list in this docket and on the Office of Fossil Energy, Department of Energy for inclusion in the FE docket in the proceeding, in accordance with the Department's regulations, 10 C.F.R. § 590.107 (2012).

Dated at Washington, DC, this 5th day of April, 2013.

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